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IN THE

Supreme Court of the United States

NO. 701

WILLIAM OTHAR KITCHENS,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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INDEX

	Page No.
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statutes and Federal Rules Involved	2
Statement of the Case	3
Reasons for granting the writ	4
Conclusion	6
Certificate of Service	6
Appendix	8
Opinion	8
Judgment	9
Statutes	9

CITATIONS.

Contee v. United States, 215 F. 2d 324	4
Taylor v. United States, 286 U.S. 1	4
Chapman v. United States, 365 U.S. 610	5
Wrightson v. United States, 222 F. 2d 556	6

STATUTES AND RULES

Section 5002 (b) (1) and Section 5642 Internal Revenue Code of 1954	3, 9
Rule 41 (e) Federal Rules of Criminal Procedure	2

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NO.

WILLIAM OTHAR KITCHENS,
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versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, William Othar Kitchens, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on the 3rd day of November, 1961.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R 148) is reproduced in the Appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on the 3rd day of November, 1961 (R 149). Petitioner filed a petition for a rehearing on the

24th day of November, 1961 (R 150), which, after consideration, was denied by the Court of Appeals without opinion on the 6th day of December, 1961 (R 153). On January 2, 1962 the Supreme Court of the United States issued an order extending the time for petitioner to file petition for writ of certiorari to and including January 25, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Appellant was indicted, tried and convicted on a one-count indictment charging violation of the Internal Revenue Laws relating to liquors. In the testimony of one of the prosecuting witnesses it appeared that an illegal search had been made of the premises, later alleged to have been sub-leased to the defendant, instead of a consent search as stated in the affidavit of the prosecuting witness. The Court refused to allow counsel to examine the witness in regard to the search.

The question presented is whether the Court should have allowed counsel for the defendant the right to examine the witness in regard to this search to determine if a motion to suppress could be made when it appeared that the defendant was not aware of the grounds for a motion to suppress prior to the testimony of this witness.

STATUTES AND FEDERAL RULES INVOLVED

Rule 41 (e) of the Federal Rules of Criminal Procedure, pertinent portion of which reads as follows:

"The motion shall be made before trial or hearing, unless the opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the Court in its discretion may entertain the motion at the trial or hearing."

Section 5008 (b) (1) and Section 5642 Internal Revenue Code of 1954 are set forth in the Appendix.

STATEMENT OF THE CASE

Appellant was tried and convicted on a one-count indictment charging violation of the Internal Revenue Laws for transporting and possessing liquors.

A federal revenue officer, one of the prosecuting witnesses, filed an affidavit stating that the premises of J. T. Taylor had been searched after Taylor had given his consent and a large quantity of liquor was found. Relying on this affidavit, counsel for the defendant made no motion to suppress the evidence before the trial of the case.

From the testimony of this officer during the trial it appeared that the officer had made a search of the premises of Taylor before obtaining his consent. After this testimony of the officer Taylor testified that these premises had been sub-leased to the defendant and were under the control of the defendant.

The Court refused to allow counsel for the defendant to examine the federal revenue officer to determine if this evidence should be suppressed since it appeared that a prior illegal search of the premises had been made and to

determine whether or not Taylor had the right to consent to this search.

REASONS FOR GRANTING THE WRIT

1. The ruling in this case is contrary to the holding in the case of *Contee* v. *United States*, 215 F. 2d 324 at page 327 where Contee's Attorney had stated that he was not aware of the seized evidence. This statement by counsel, so held the Court, satisfied, prima facie at least, the provision of the rule allowing a motion to be made during trial if the defendant "was not aware of the grounds for the motion." In the Contee case the Court made no inquiry to test the validity of counsel's statement but denied the motion without further question. Even though some element of neglect on the part of Contee's counsel might have been in the case, such was not sufficient to deprive appellant of his right to have the admissibility of the evidence questioned. As the Court said: "But under the circumstances we must give the accused the benefit of the doubt, and hold that the Court's preemptory rejection of counsel's statement was erroneous."

2. The ruling in this case is also different from the holding in the case of *Taylor v. United States*, 286 U.S. 1, 76 L. Ed 951. In the Taylor case officers went to the premises of the defendant, smelled whiskey and looked "through a small opening" and saw many cardboard boxes which they thought probably contained jars of whiskey. Then they entered. The search was held to be unreasonable. Likewise when the officers in the instant case looked "through a crack over the door" and saw jars on the side (R. 52) at a time before they had ever talked to the lessee of the prem-

ises, they brought themselves within the ruling of Taylor, supra. Absent any showing of a bona fide, though later, consent search on the part of the lessee, that seach would be unreasonable and a subsequent seizure using the information so acquired could not be distinguished nor separated from the initial faulty beginning. Search and seizure are not easily isolatable but are bound together by one sole purpose and are incapable of being untied.

The Court below in refusing the appellant the opportunity to go into and question the consent supposedly given by Taylor subsequent to the search of the officers and the right of Taylor to give such consent and the reasonableness or unreasonableness of this search deprived appellant of a substantial right under the circumstances in this case. The net effect was to permit the introduction of evidence against appellant which may have been illegally seized.

3. The ruling in this case is also contrary to the holding in the case of *Chapman* v. *United States*, 365 U.S. 610 in which the Court held that a landlord did not have a right to authorize officers to search the premises of his tenant as in the instant case where Taylor authorized the officers to seach the chicken house that he later testified had been sub-leased by him solely to the defendant. Prior to the testimony of Taylor, the defendant did not know that Taylor would contend that any part of the premises had ever been sub-leased to the defendant.

"The appellant invoked a constitutional right and we are dealing with the constitutional question. We are not dealing with a mere error of law occurring in the course of trial

and which can be disregarded as harmless." *Wrightson* v. *United States*, 222 F. 2d. 556 at pages 560 and 561.

CONCLUSION

The serious question of public policy and individual rights involved here and the effect of the decision below, if unreversed, make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

For these reasons and the reasons set forth above, it is respectfully submitted that the petition for writ of certiorari should be granted.

CERTIFICATE OF SERVICE

GEORGIA, BALDWIN COUNTY

Personally appeared before the undersigned attesting officer James M. Watts, who, after first being duly sworn, on oath says that he is the counsel for the appellant in the foregoing case and that he has served the within petition (1) by mail upon the Solicitor General, Department of Justice, Washington 25, D. C. by depositing the same in a United States Post Office with sufficient air mail postage attached, addressed to him at his post office address, in accordance with Rule 33 (1), Supreme Court Rules, and (2) by mail upon Honorable Floyd M. Buford, United States Attorney, Middle District of Georgia, Post Office Building, Macon, Georgia, the attorney of record who represented the United States in the Court whose judgment is sought to be reviewed, by depositing the same in a United States Post Office with sufficient first class postage attached, ad-

dressed to him at his post office address, in accordance with Rule 33 (1), Supreme Court Rules.

This 17th day of January, 1962.

JAMES M. WATTS.
James M. Watts
Post Office Box 401
Milledgeville, Georgia

Sworn to and subscribed before me:
Mary G. Wyatt
Notary Public, Baldwin County, Georgia

(S E A L)

CERTIFICATE OF GOOD FAITH

I hereby certify that the foregoing Petition for Rehearing is filed in good faith and not for the purpose of delay.

(Signed) JAMES M. WATTS

APPENDIX

OPINION
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18,990

WILLIAM OTHAR KITCHENS,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(November 3, 1961)

Before TUTTLE, Chief Judge, CAMERON and BROWN, Circuit Judges.

PER CURIAM: It appearing that although no motion to Suppress the evidence found by the alleged illegal search was made prior to trial, such motion was made and passed upon by the trial court at the trial. The procedure followed fully complies with the requirements of Rule 41 (e), Federal Rules Criminal Procedure. We find no error in the

manner in which this matter was handled by the trial court or in his decision thereabout.

No other errors appearing, the judgment is

AFFIRMED.

JUDGMENT

Extract from the Minutes of November 3, 1961

WILLIAM OTHAR KITCHENS
versus No. 18,990
UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of said District Court in this cause be, and the same is hereby, affirmed.

STATUTES

26 U.S.C.A. 5008 (b) Stamps for containers of other distilled spirits —

(1) Requirements — No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto in such manner as to be broken on opening the container, a stamp evidencing the tax or indicating compliance with the provisions

of this chapter. The provisions of this subsection shall not apply to:—

(A) distilled spirits placed in containers for immediate consumption on the premises or for preparation for such consumption;

(B) distilled spirits in bond or in customs custody;

(C) distilled spirits in immediate container required to be stamped under subsection (a) or under other provisions of internal revenue or customs law and regulations;

(D) distilled spirits in actual process of rectification, blending, or bottling, or in actual use in process of manufacture;

(E) distilled spirits on which no internal revenue tax is required to be paid or which are bottled especially for export with benefit of drawback;

(F) distilled spirits not intended for sale; or for use in the manufacture or reproduction of any article intended for sale; or

(G) any regularly established common carrier receiving, transporting, delivering, or holding for transportation or delivery in the ordinary course of its business as a common carrier.

26 U.S.C.A. 5642. Penalties for transporting, possessing, etc. distilled spirits in unstamped containers or counterfeiting of stamps, etc.

Any person who violates any provision of section 5008 (b), or who, with intent to defraud, falsely makes, forges, alters, or counterfeits any stamp made or used under this section, or who uses, sells, or has in his possession any such forged, altered, or counterfeited stamp, or any plate or die used or which may be used in the manufacture thereof, or any stamp required to be destroyed by such section, or who makes, uses, sells, or has in his possession any such imitation of the paper used in the manufacture of any such stamp, or who reuses any stamp required to be destroyed by such section, or who places any distilled spirits in any bottle which has been filled and stamped under such section without destroying the stamp previously affixed to such bottle, or who affixes any stamp issued under this section to any container of distilled spirits on which any tax due is undetermined or unpaid, or who makes any false statements in any application for stamps under such section, or who has in his possession any such stamps obtained by him otherwise than as provided in section 5008 (b) (2), shall on conviction be punished by a fine of not more than $1,000, or by imprisonment at hard labor for not more than 5 years, or both. Any officer authorized to enforce any provision of law relating to internal revenue stamps is authorized to enforce this section and section 5644 (relating to the bottling of distilled spirits in bond.)